

# In the Privy Council.

No. 123 of 1936.

## ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

BETWEEN

KNIGHT SUGAR COMPANY ... .. (Plaintiff) Appellant,

AND

THE ALBERTA RAILWAY AND IRRIGATION COMPANY ... .. (Defendant) Respondent.

## CASE FOR THE RESPONDENT.

1. This is an Appeal from a judgment of the Appellate Division of the Supreme Court of Alberta, delivered on 28th February, 1936, dismissing an appeal from the judgment of the Honourable Mr. Justice Ford delivered on 13th September, 1935, dismissing the Appellant's action with costs. Record.  
p. 93.  
p. 82.

2. The action was brought for a declaration that the Appellant, under an agreement for sale and upon the registration of Transfers of certain lands in Alberta, became the owner of all mines and minerals, other than coal and precious metals, underlying the lands transferred ; or, alternatively, for a declaration that the Appellant is the owner of the petroleum and natural gas thereunder. p. 4, l. 28, et  
seq.

3. The facts and circumstances out of which the action arose are as follows :—

4. By agreement of 25th November, 1903, the Respondent's predecessor in title, agreed to sell and the Appellant agreed to buy 223,124.89 acres of land in Alberta for a consideration of \$446,249.78. p. 50.

Record.  
p. 51, l. 10,  
*et seq.*

5. The agreement contained a covenant by the Vendor to convey the land, “ by a good and sufficient deed in fee simple . . . freed and discharged “ from all encumbrances, but subject to the conditions and reservations “ expressed in the grant thereof from the Crown.”

6. The Crown grants to the Respondent’s predecessor in title contained the exception following :—

p. 54, l. 3.

“ Also saving, excepting and reserving unto US, our successors and assigns, all coal mines, coal pits, seams and veins of coal, as well open as not open, which shall or may be wrought, found out or discovered or which may exist within, upon or under the said lands, together with full power to work the same, and for this purpose to enter upon and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said mines, pits, seams and veins.”

p. 55.

7. The Certificates of Title issued to the Respondent’s predecessor under the Land Titles Act, pursuant to the grants from the Crown, contained the following reservation :—

p. 55, l. 33.

“ Reserving unto His Majesty, His successors and assigns, all coal mines, coal pits, seams and veins of coal and the right to work the same.”

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p. 16, l. 12.

p. 31, l. 31.

p. 75, l. 19.

8. Although the agreement of November, 1903, contemplated the delivery of title only upon payment in full of the purchase price which was payable in ten annual instalments, the Appellant from time to time during the years 1903 to 1913 resold portions of the lands to other purchasers and the Respondent, at the request of the Appellant, executed and delivered to the Appellant transfers of the lands so resold.

p. 35, l. 12.

p. 78, l. 15.

9. The purchase money was paid in full and the transfer of title completed before the end of March, 1913.

p. 57, l. 28.

10. All the transfers delivered by the Respondent to the Appellant between the years 1903 and 1913 contained an exception in the words following :—

“ excepting therefrom all coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof as the Company may consider necessary for the purpose of working and removing the said coal and minerals.”

p. 58.

11. The Certificates of Title issued to the Appellant under the Land

Titles Act, upon the registration of these transfers contained the following exception :-- Record.

“ Excepting thereout all coal and other minerals.”

12. From 1907 onward the Appellant, in making title to the lands which had been re-sold, issued to its purchasers transfers under the Land Titles Act, all or most of which contained, when executed, or were amended by the Appellant at the request of the Registrar of Land Titles to include, the following reservation :— pp. 64, 65,  
67, 68, 70,  
71, 73.  
p. 80.

10 “ Reserving unto His Majesty all coal, and unto the Alberta Railway  
“ and Irrigation Company all other minerals.”

13. No question was raised by the Appellant regarding the ownership of the minerals until 29th July, 1930, when the Appellant demanded in writing of the Respondent “ a transfer of all mines and minerals, excepting “ coal, in and to all the lands ” now in question. p. 74, l. 28.  
p. 75, l. 4.

14. The demand was based, not upon the agreement of 25th November, 1903, but upon an earlier agreement of 1901, which is not now material. It was made because one Walker, an Accountant employed by the Appellant, in reading the agreement of 1901, discovered (as he put it) that the Appellant was entitled to the minerals. p. 35, l. 32.

20 15. This action was brought on 3rd July, 1933, the Appellant by its amended Statement of Claim seeking the following relief :—

“ (a) A declaration of this Honourable Court that the Plaintiff (Appellant) under the Agreements referred to in its Statement of Claim, and on the registration of the transfers of the lands in question, became the owner of and entitled to all mines and minerals other than coal and precious metals, and the right to work and mine the same. p. 4, l. 27.

30 “ (aa) In the alternative a declaration that the Plaintiff (Appellant) is the owner of and entitled to the petroleum and natural gas rights in and under the lands described in the Articles of Agreement referred to in Paragraph 7a hereof.

“ (b) An account of all mines and minerals alienated by the Defendant (Respondent).

“ (c) Judgment for the value of mines and minerals so alienated.

“ (d) Such further and other relief as to this Honourable Court may seem meet.”

16. At the trial it was admitted by Counsel for the Appellant, as a matter of fact, that at all times material petroleum and natural gas came within the definition of minerals. p. 7, l. 38.

Record.  
p. 9, l. 14.

**17.** The case presented for the Appellant was that on a proper construction of the transfers only coal was reserved—or, alternatively, that petroleum and natural gas were not reserved—and that the Appellant was not asking for anything more than it already had.

p. 9, l. 24.

**18.** Counsel for the Appellant conceded that the decision of the Supreme Court of Canada in *Hansen v. Franz*, (1918), 57 S.C.R., 57, precluded him from arguing, in a Canadian Court at least, that the preliminary agreement was not merged in the deed. He suggested he might argue “elsewhere,” that the doctrine of merger could not be applied to a transfer under the Land Titles Act of Alberta.

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p. 83, l. 7.  
p. 84, l. 36.

**19.** The Trial Judge, Ford, J., dismissed the Appellant’s action. He held that the real completed contract between the parties was to be found in the transfers ; that the agreement of November, 1903, though admissible for certain purposes, contained nothing to assist him in arriving at the meaning of the words “other minerals”; that, apart from the Appellant’s admission, these words in their natural meaning, included petroleum and natural gas ; that in the circumstances of this case, the rule *ejusdem generis* had no application, and that even if the rule were applied, petroleum and natural gas came within the exception, holding them, on the evidence, to be of like kind with coal.

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p. 87, l. 25.

**20.** The learned Trial Judge was also of the view (though, in his opinion, unnecessary to a decision of the case) that the Appellant’s conduct between the years 1918 and 1925 brought the case within the principle of *Watcham v. Attorney General of the East African Protectorate* [1919], A.C. 533.

p. 95.  
p. 93, l. 29.

**21.** An appeal from this judgment was dismissed by the Appellate Division of the Supreme Court of Alberta, consisting of the Chief Justice of Alberta and Clarke, McGillivray, Lunney and Ewing J.J.A. The Chief Justice, who delivered the judgment of the Court, said it was obvious that no meaning whatever could be given to the words “and other minerals” if the Appellant’s claim for a declaration that it was the owner of all the minerals except coal were granted. On the alternative claim to petroleum and natural gas, based on the rule *ejusdem generis*, he held there was no evidence of intention that the words of the exception were not to have their natural meaning. He rejected the Appellant’s contention that if the Respondent had not conveyed to the Appellant all the minerals except coal, it had not fully performed its agreement, pointing out that such an issue was not raised by the pleadings, and that if it were raised the evidence might be quite different.

p. 94, l. 8.

p. 94, l. 27.

**22.** The Respondent contends that the Judgment appealed from is right and should be affirmed for the following

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## REASONS.

1. Because the completed contract between the Appellant and Respondent is to be found in the transfers.
2. Because the words " and other minerals " in their natural meaning include all minerals other than coal.
3. Because the Appellant's claim for a declaration can be supported only by assuming, not merely without evidence, but contrary to the evidence, that the parties had not altered their contract between 1903 and 1913.
- 10 4. Because the Appellant's conduct throughout from 1903 to 1930 is consistent only with the intention that all minerals were excepted.
5. Because the rule *ejusdem generis* or the rule *noscitur a sociis* cannot be applied where, as here, there is no evidence of an intention to use the words in a restricted sense.
6. Because if either rule be applied, the finding of the Trial Judge that petroleum and natural gas are of a like kind to coal, should not be disturbed.
- 20 7. Because the agreement of November, 1903, was merged in the transfers.
8. Because the transfers are in the form prescribed by Statute and customary in Alberta, and must be taken to be the form of conveyance for which the parties intended to stipulate.
9. Because the decision of the Supreme Court of Canada in *Hansen v. Franz* (1918) 57 S.C.R., 57, is right.
10. Because, even if wrongly decided, the authority of that case should not now be disturbed.
- 30 11. Because the judgments of the Trial Judge and the Appellate Division are right, for the reasons therein stated.

W. N. TILLEY.

G. A. WALKER.



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